

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11WB-64001-E
EEOC CHARGE NO. 17E-2013-00494

Q.H.,)	
)	
Complainant,)	<u>Administrative Action</u>
)	
v.)	FINDING OF PROBABLE CAUSE
)	
Sweet Heaven and Darrell Bethea,)	
Owner, Individually,)	
)	
Respondents.)	

On July 24, 2013, Q.H. (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Sweet Heaven, and its owner, Darrell Bethea, subjected her to sexual harassment and retaliated against her for rejecting Bethea's sexual advances, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondents denied the allegations of discrimination and retaliation in their entirety. Based on DCR's ensuing investigation and the governing legal standards, the Director now finds, for the purpose of this disposition only, as follows.

Sweet Heaven is a coffee shop and deli that has been operating in the New Jersey State House since approximately May 2000, in conjunction with the NJ Commission for the Blind & Visually Impaired's Business Enterprise Program (BEP).

Complainant is a Trenton resident who began working at the shop as a cashier on November 15, 2010. Complainant alleged that sometime between November 2010 and January 2011, Bethea told her that his wife took fertility pills to have their son and no longer wanted to have sex with him. On December 2, 2011, Complainant commenced a pregnancy leave and then voluntarily separated from the employer.

On October 4, 2012, Complainant returned to work for Respondent. She alleged that in November 2012, Bethea began offering her \$10 to photograph her breasts and, on one occasion, offered her \$30 to engage in oral sex. She alleged that in February or March 2013, he repeatedly asked her to accompany him to a business conference in Illinois, which she refused. She stated:

When the trip came up, he asked me to come on the trip, and we could have sex. He was saying that I would get paid as an assistant for the disabled for Mr. Bethea. He is [legally] blind and deaf. It would be \$720 for the week. It would be a one-week trip.

Complainant alleged that once, in April 2013, she gave in to his requests and allowed him to photograph her breasts for \$10. Complainant alleged that in April and May 2013, Bethea made offensive sexual remarks to her such as, "I want to slop you up with a butter biscuit." She alleged that her mother, whom she was speaking with on the telephone at the time, overheard the comment. Complainant alleged that she was ultimately fired on July 3, 2013, because she refused to accompany Bethea on the trip.

Bethea denied making any inappropriate remarks to Complainant. He denied ever asking to photograph her breasts or engage in sex. He denied attending a business conference in Illinois in 2013. He told DCR that he attended the Indy Super Blast–Training Conference for Merchant Vendors, Program Staff, Corporate Partners, and All Blind and Vision Impaired People Interested in Entrepreneurial Venture (BLAST) conference in Indianapolis, Indiana, from May 18, 2013, to May 24, 2013.¹ Bethea, who is vision and hearing-impaired, stated that he has a personal assistant, which would negate the need for Complainant to accompany him on a trip.

Bethea acknowledged that his wife used fertility drugs twelve years earlier, and that he had mentioned that fact to long-time customers on four or five occasions. However, he denied ever speaking with Complainant about his wife's fertility treatment.

¹ When apprised of that assertion, Complainant told DCR that she simply misidentified the state.

Bethea denied firing Complainant. He said that Complainant angrily confronted him after learning that a newly hired employee was being paid the same hourly wage as she, and then quit when he refused to increase her salary. He produced a decision from the NJ Division of Unemployment and Temporary Disability Insurance supporting his version of events. See Notice of Determination of Deputy R. Nebbia for James H. Fink, Director, Div. of Unemployment Insurance, Aug. 8, 2013. That determination found, in pertinent part:

You are hereby notified that based upon the facts obtained and in accordance with the New Jersey Unemployment Compensation law, the Deputy (named below) has determined that . . . [y]ou left work voluntarily on 07/03/13. You left work voluntarily because your request for a raise was denied. You were being paid in accordance with the conditions of your employment and your employer had not promised to increase your rate of pay. Therefore, your reason for leaving does not constitute good cause attributable to the work. You are disqualified for benefits.

Ibid. Complainant's appeal of that determination was unsuccessful. See Appeal Tribunal, NJ Department of Labor & Workforce Development, In the Matter of [Complainant], Docket No, 437,785, Oct. 11, 2013.

When apprised of Respondents' position regarding the circumstances of her separation, Complainant acknowledged that she had a dispute with Bethea on July 3, 2013, over her hourly wages because she was expecting an \$1/hr increase. She said that Bethea told her that she had to complete one year of service to be eligible for a raise and that if she did not like it, she could turn in her building pass. She stated that she threw her building pass on the table, told him to "Shut the fuck up," and left.

DCR interviewed four females who at one time worked for Respondent. Three of those witnesses—S.M., V.S., and M.M.—denied ever witnessing Bethea engage in any sexually harassing behavior. The fourth witness, Q.N., who worked at the shop from May 2013 through December 2013, stated that she was subjected to unwelcome sexual remarks from Bethea. Q.N. told DCR that Bethea asked her if she had ever engaged in a "sexual threesome," and made inappropriate comments about her body such as, "You have big bonkers," and "You have big

boobs.” Q.N. also stated:

Mr. Bethea asked me to accompany him on a trip to Illinois or Los Angeles, which was to occur in October 2013. Mr. Bethea did not specify the purpose of the trip as a business trip, but he told me that “grown people things” happen there.

DCR obtained a document entitled, “Timeline Summary,” prepared by BEP Supervising Community Program Specialist Delavar Basha, documenting Q.N.’s internal complaint against Bethea. Basha wrote, in part:

I called [Q.N.] and had a phone conversation with her. She explained that she worked for Mr. Bathea [sic] from May 2013 to December 2013. She admitted that she was let go in December 2013 for returning very late from break, without providing any notice or explanation. [Q.N.] alleged that, during her time as an employee for Mr. Bathea [sic], he talked to her “like someone from the street.” She also alleged that Mr. Bathea [sic] had no respect for her and made comments of the sexual nature.”

Complainant’s mother, A.J., stated that Complainant typically called her on the telephone two or three times a week from the shop, and that during one such call in 2011, she overheard Bethea say to Complainant, “Since you’ve been pregnant, your breasts are getting big and juicy.” A.J. confirmed that she overheard Bethea tell Complainant, “I want to sop you up with a biscuit.” However, she stated that the biscuit comment occurred in 2011, not 2013 as reported by Complainant. A.J. alleged that she was with Complainant in July 2011, when Complainant called Bethea asking if A.J. could work at the shop as well. A.J. alleges that Bethea replied, “Is she as sexy as you are?”

Analysis

Hostile work environment sexual harassment is a form of gender discrimination. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). In such cases, the critical issues are whether the conduct occurred because of gender, and whether a reasonable woman would find the conduct to be severe or pervasive enough to alter the conditions of employment and create an intimidating, hostile, or offensive working environment. Id. at 603. In reaching those determinations, courts focus on the conduct itself, not its effect upon the plaintiff or the workplace.

Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). Neither a plaintiff's subjective response to the harassment, nor the defendant's subjective intent, is controlling as to whether a hostile work environment claim is viable. Ibid.

When the harasser is the owner of the business, his or her conduct "carries with it the power and authority of the office." See Taylor v. Metzger, 152 N.J. 490, 505 (1998). In cases where the harasser is the ultimate supervisor, the employee's dilemma is "acute and insoluble" because she has "nowhere to turn." Ibid.

Workplace reprisal means taking an adverse employment action against someone "because that person has opposed any practices or acts forbidden under [the LAD] or because that person has filed a complaint, testified or assisted in any proceeding under [he LAD]." N.J.S.A. 10:12-5(d).

At the conclusion of an investigation, the Director is required to determine whether "probable cause" exists to credit a complainant's allegation of discrimination. N.J.A.C. 13:4-10.2. Probable cause for purposes of this analysis means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

In this case, arguably the most egregious allegation was uncorroborated, i.e., Complainant's claim that she was fired for refusing to accompany Bethea on a sexual tryst to Illinois. The investigation found that there was no discharge. Because the investigation could not corroborate that the alleged adverse employment action occurred, the allegation of retaliation cannot stand.

In addition, although not raised by the Respondents, who are appearing *pro se*, there is an issue as to whether remarks allegedly made before January 24, 2013, fall outside the LAD's statute of limitations or survive under a continuing violation theory (e.g., Complainant's allegation that Bethea stated that his wife took fertility pills and no longer wanted to have sex with him). Moreover, normal credibility issues arising from concerns of bias and prejudice are heightened when, as here, the supporting evidence is a parent's uncorroborated testimony. See e.g., Hon. John L. Kane, "Judging Credibility," Litigation Mag., (ABA Spring 2007) (noting "I expect a mother to be highly motivated to protect and support her child.").


Still, the statements of Q.N. and, perhaps to a lesser extent, Complainant's mother, support the allegations of a hostile workplace where the owner made lewd and inappropriate remarks such as commenting on an employee's breasts and inviting his female subordinates to accompany him to overnight trips out-of-state. Complainant's admission that she accepted money to allow Bethea to photograph her breasts lends credence to allegation that the proposition was made. It seems unlikely that someone would make such an unsolicited admission, particularly where the other party denies the conduct altogether. Nor does that admission change the fact that the appropriate inquiry is whether a "reasonable woman" in Complainant's position would find the proposition and any other sexually charged remarks to be severe or pervasive enough to alter the conditions of employment and create a hostile work environment. Lehmann, supra, 132 N.J. at 603; Cutler, supra, 196 N.J. at 430-31.

Accordingly, at this threshold stage of the process, the Director finds that there is enough to support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road to an adjudication on the merits." Frank,

supra, 228 N.J. Super. at 56.² In view of the above, it is found that PROBABLE CAUSE exists to credit the allegations of sexual harassment but not retaliation.

DATE:

12-31-14



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS

² Similarly, at this threshold stage of the process, the Director takes no position as to the whether the claim against Bethea individually can survive.